

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 12, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 97-2673-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**JAMES L. NEELEY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Grant County:  
GEORGE S. CURRY, Judge. *Affirmed.*

VERGERONT, J.<sup>1</sup> The State appeals from an order granting the motion of James Neeley to exclude a statement he made at his initial appearance. Neeley was charged with one count of causing injury to another by the operation

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

of a vehicle while under the influence of an intoxicant, contrary to § 346.63(2)(a)1, STATS., and one count of causing injury to another while driving with a prohibited alcohol concentration in violation of § 346.63(2)(a)2. The State argues that the trial court erred in excluding the statement because it was not a guilty plea entered at an arraignment and there are no other proper grounds for the statement's exclusion. We conclude that the trial court properly exercised its discretion in excluding the statement and we therefore affirm.

The complaint was served on Neeley and he appeared unrepresented at the initial appearance before the court commissioner. The assistant district attorney was also present. The court commissioner read both counts of the complaint to Neeley and the following dialogue took place:

THE COURT COMMISSIONER: Are you prepared to make a plea on the Complaint?

THE DEFENDANT: Well, yes, Your Honor; but I would like to explain about the report. If you have read it, it says  
—

THE COURT COMMISSIONER: I have just glanced at the principal part of the Complaint. One thing I would say to you, if you are prepared to enter a plea — If you enter a plea other than Not Guilty, I unfortunately cannot accept it because I am a Court Commissioner and not a Judge. If there is any plea — or any conviction of an offense that may result in a criminal penalty against you, the judgment must be entered by a Judge. But — Proceed. Do you want to make a comment?

THE DEFENDANT: Well, it is just about the Report. It is not correct.

THE COURT COMMISSIONER: Do you feel that the statements in the Complaint are such that they — they may affect the finding of Guilt or Innocence?

THE DEFENDANT: No. I'm Guilty, but —

THE COURT COMMISSIONER: Well, I will just take that as a casual [sic] comment and not a plea. I also need to inform you, Mr. Neeley, that you do have a right to an attorney. Have you had an opportunity —

THE DEFENDANT: I tried to get one and they said that there was no — that it — that they couldn't come down here. I tried to contact the Public Defender's Office.

There was then discussion between the court commissioner and Neeley about contacting the public defender's office, followed by this interchange:

THE COURT COMMISSIONER: ... But I would recommend, in my judgment from which you told me, if you feel that there is some deficiency in the Complaint —

THE DEFENDANT: Huh-uh.

THE COURT COMMISSIONER: — then that's why you want to have a lawyer.

THE DEFENDANT: Okay, so I will plead Not Guilty then.

THE COURT COMMISSIONER: Well, I will — What I will do is, I will allow you the opportunity to discuss [sic] with an attorney. And then we will set this on for Arraignment.

Neeley eventually obtained representation, and his counsel moved to exclude his statement to the court commissioner, “No. I'm guilty, but—” and the question of the commissioner just preceding that statement. Neeley asserted in his motion that the probative value of the statement was substantially outweighed by

the danger of unfair prejudice, confusion of the issues and misleading the jury, citing § 904.03, STATS.<sup>2</sup>

At the motion hearing, defense counsel argued that the statement should be excluded because it was unfairly prejudicial in that Neeley never had a chance to complete the statement and it could mislead the jury. Counsel pointed out that it was clear that Neeley was trying to point out a problem with the complaint but never had a chance to do that. Counsel also asserted that Neeley's defense was that he admitted to drinking and driving but denied that the accident was caused by intoxication, and he may well have intended to say he was guilty, but only of drunk driving, not of causing injury as a result of intoxication.

The trial court granted Neeley's motion. In discussing the statement sought to be excluded, "No. I'm guilty, but—," the trial court observed that the word "but" usually negates everything before it. The court also observed that it was unclear whether Neeley was cut off before finishing what he intended to say and it was unclear what he meant by the words "I am guilty," but it was clear he was indicating something was wrong with the "report," or complaint. The court noted that sometimes when in court, people say they are guilty and then, after further discussion, the judge finds they did not really intend to plead guilty and permits them to plead not guilty.

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<sup>2</sup> Section 904.03, STATS., provides:

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The court also noted that Neeley did not have the benefit of counsel. The court recognized that the court commissioner was not in the process of taking a plea, since this was the initial appearance; but the court observed that even if Neeley had pleaded guilty, he could have withdrawn his guilty plea at a later stage prior to sentencing. The court concluded that the lack of counsel, the uncertainty of what Neeley was going to say after the “but,” and the fact that Neeley was trying to indicate something was not correct in the complaint, all made it inappropriate to admit the statement.

The court granted a motion for a stay of the trial to permit the State to seek an interlocutory appeal, and we granted leave to appeal.

Both parties recognize that the admissibility of evidence is generally a matter within the trial court’s discretion. *See State v. Clark*, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). We do not reverse discretionary evidentiary rulings when the court has exercised its discretion in accordance with accepted legal standards and the facts of record. *Id.* The State contends that the court made an error of law in exercising its discretion because it erroneously interpreted § 904.10, STATS. This statute provides in pertinent part:

Evidence of a plea of guilty, later withdrawn, or a plea of no contest, ... is not admissible in ... criminal proceeding against the person who made the plea.... Evidence of statements made in court ... in connection with any of the foregoing pleas ... is not admissible.

The State argues that Neeley’s statement was not a guilty plea for these reasons: the court commissioner was conducting an initial appearance, not an arraignment; the commissioner told Neeley that he could not accept a plea other than one of not guilty; and the commissioner said he would not construe Neeley’s

statement as a plea. Therefore, according to the State, § 904.10, STATS., is not a basis for excluding the statement. The State also argues that the lack of counsel is not a basis for excluding the statement because there is no requirement that a defendant must have an attorney in order for a statement of this type to be admissible.

We do not understand the court to have rested its decision on a conclusion that § 904.10, STATS., applied in this case. Rather, the court decided that it could not determine what Neeley meant by the statement—whether he intended to plead guilty or intended to provide an explanation as to why he was not guilty of something. The court was merely observing that even were the statement considered a guilty plea, Neeley could withdraw it. In other words, the court was saying that if it were a guilty plea, Neeley would have been able to withdraw it and the plea then could not be used against him. Therefore, the court reasoned, since it is not even clear Neeley intended to enter a guilty plea, the statement should not be used against him.

Although the trial court did not expressly refer to § 904.03, STATS., in its ruling, that was the basis for the motion and the context of the argument defense counsel made at the hearing on the motion. We understand the court's conclusion in that context. The court decided that because the statement was ambiguous, it would be unfair to admit it. In the context of a motion based on § 904.03, that means the court was ruling that the probative value would be outweighed by unfair prejudice. We conclude that this is a proper exercise of the trial court's discretion.

The trial court analyzed the transcript of the initial appearance in detail. Its conclusion that the statement is ambiguous is reasonable. The probative

value of the statement is diminished by its ambiguity. A reasonable court could decide that under the circumstances it would be unfairly prejudicial to give a jury the opportunity to conclude from the statement that Neeley intended to admit guilt to the counts in the complaint, and that this danger outweighed whatever probative value the ambiguous statement might have.

We do not understand the court to have been under the impression that there was any requirement that Neeley be represented by an attorney in order for the statement to be admissible. Rather, the court considered the lack of representation as a factor that contributed to the confusion of the proceeding and the ambiguity of the statement. This was an appropriate factor for the court to consider.

In summary, we conclude that the trial court did not base its ruling on an erroneous interpretation of § 904.10, STATS., but instead properly exercised its discretion in excluding the statement under § 904.03, STATS.

*By the Court.*—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

